Supreme Court, U.S.
FILED

(1)

97 814 NOV 13 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

CITY OF CLEVELAND,

Petitioner,

v.

NATION OF ISLAM, MUHAMMAD'S MOSQUE NO. 18, AND ROLAND MUHAMMAD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

SHARON SOBOL JORDAN
Director of Law
City of Cleveland
601 Lakeside Avenue,
Room 106
Cleveland, Ohio 44114-1077
(216) 664-2675
Attorney for Petitioner

CHARLES E. HANNAN, JR.
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue,
Room 106
Cleveland, Ohio 44114-1077
(216) 664-4333
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether pursuant to *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), a court may refuse to assess 42 U.S.C. § 1988 attorney's fees against a local government plaintiff that initiates a civil rights declaratory judgment action to resolve a conflict between state civil rights laws and a religious organization's First Amendment rights in the state court, and loses following removal of the case to federal court by the religious organization?

2. Whether special circumstances exist to preclude the imposition of a prevailing private party's attorney's fees upon a losing local government party in a civil rights action commenced by the local government in order to obtain judicial interpretation of conflicting constitutional and civil rights claims?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

THE CONSTITUTIONAL PROVISIONS AT ISSUE .. 2

THE FEDERAL STATUTE AT ISSUE 3

THE STATE CIVIL RIGHTS STATUTE AT ISSUE ... 4

THE MUNICIPAL ORDINANCES AT ISSUE 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT OF CERTIORARI 7

I. The Opinion of the Court of Appeals Conflicts with the Decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) 9

II. Imposition of a prevailing private party's attorney's fees upon a losing government party in a civil rights action, commenced by the government party in order to obtain judicial interpretation of conflicting constitutional and civil rights claims, results in an unreasonable and unjust restraint to the vigorous enforcement of the Civil Rights Acts advocated by this Court and by the legislature 16

CONCLUSION 19

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 7

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) ..... *passim*

Farrar v. Hobby, 506 U.S. 103 (1992) 13

Hensley v. Eckerhart, 461 U.S. 424 (1983) 8, 16, 19

Hughes v. Rowe, 449 U.S. 5 (1980) 8, 9, 15

Independent Fed. Of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 9, 14

Kentucky v. Graham, 473 U.S. 159 (1985) 13

Kirchberg v. Feenstra, 708 F.2d 991 (5th Cir. 1983) 13, 14

Maag v. Wessler, 993 F.2d 718 (9th Cir. 1993) 15

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 16

People of State of New York by Abrams v. 11 Cornwell Co., 718 F.2d 22 (2d Cir. 1983) 13

Pierce v. Underwood, 487 U.S. 522 (1988) 15

Seattle School Dist. No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982) 18

Society of Professional Journalists v. Briggs, 687 F.Supp. 1521 (D. Utah 1988) 18

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. den.*, 470 U.S. 1051 (1985) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS

U.S. Constitution, Amendment I 2, 6, 11, 14

U.S. Constitution Amendment XIV 3, 6

Equal Access to Justice Act (See also 42 U.S.C. § 2412(d)(1)(A)) 15

§ 706(k) of the Civil Rights Act of 1964 (See 42 U.S.C. § 2000e-5(k)) 14

42 U.S.C. § 1983..... 9

42 U.S.C. § 1988(b) ..... *passim*

42 U.S.C. § 2000e-5(k) 14

42 U.S.C. § 2412(d)(1)(A) 16, 17

STATE STATUTES

Ohio Revised Code § 4112.01(A)(9).....4, 10

Ohio Revised Code § 4112.02(G) 4, 10, 11

MUNICIPAL ORDINANCES

Cleveland, Ohio; Ordinances § 667.01 .....4, 5, 11

Cleveland, Ohio; Ordinances § 667.99 .....5, 11

MISCELLANEOUS AUTHORITIES

S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908 .....13, 16, 19

H.Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals of August 15, 1997 (hereinafter, "the Opinion"), review of which is sought by this petition, is unpublished. It is reprinted in the appendix to this petition at page App. 1. The Opinion reversed a decision by the United States District Court for the Northern District of Ohio, which had denied Respondents' request for attorneys' fees under 42 U.S.C. § 1988.

The District Court's opinion of February 7, 1996, denying Respondents' request for attorneys' fees under 42 U.S.C. § 1988 is also unpublished. It is reprinted at App. 7.

The District Court's memorandum and order of November 1, 1995, rendering judgment for Respondent on its counterclaim and granting Respondent's motion for preliminary and permanent injunction, instructing the City of Cleveland to lease its Convention Center to the Respondent for a "men only" address by Minister Louis Farrakhan, is unpublished. It is reprinted at App. 12.

JURISDICTION

The Sixth Circuit's Opinion was issued on August 15, 1997. *See* App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE FEDERAL STATUTE AT ISSUE

42 U.S.C. § 1988(b):

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

THE STATE CIVIL RIGHTS STATUTE AT ISSUE

Ohio Revised Code § 4112.01(A)(9):

"Place of public accommodation" means any inn, restaurant, eating house, barber shop, public conveyance by air, land or water, theater, store other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

Ohio Revised Code § 4112.02(G):

It shall be an unlawful discriminatory practice (f)or any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

THE MUNICIPAL ORDINANCES AT ISSUE

City of Cleveland Codified, Ordinances, § 667.01 Discrimination in Public Accommodations:

No person, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by land or water, theater, public or private hospital or other place of public accommodation and amusement, shall deny to a citizen, except for reasons applicable to all citizens, and regardless of race, religion, color, sex, sexual orientation, national origin, age, disability, ethnic group, or Vietnam-era or disabled

veteran status, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, and no person shall aid or incite the denial thereof. Whoever violates this section shall be subject to the revocation of a license issued for the operation of such business. (Ord. No. 77-94, Passed 3-14-94, eff., 3-23-94).

City of Cleveland Codified Ordinances, § 667.99 Penalty:

Whoever violates any of the provisions of this chapter shall be fined not more than one thousand dollars ($1,000) and imprisoned for not more than thirty days. (Ord. No. 1333-64. Passed 5/17/65, eff. 5-20-65).

STATEMENT OF THE CASE

On January 6, 1995, after fruitless negotiations with the Nation of Islam ("Nation"), the City of Cleveland ("City") filed a Complaint for Declaratory Judgment against the Nation of Islam in the Court of Common Pleas, Cuyahoga County, Ohio, Case No. CV-282998. (App. 51-55). The declaratory judgment action sought a declaration that leasing the City's Convention Center to the Nation of Islam for their planned event for "men only" would constitute a violation of Ohio Revised Code, Chapter 4112, and Section 667.01 of the Codified Ordinances of Cleveland, Ohio, both which prohibit proprietors of a place of public accommodation to deny any person for reasons of race, color religion, sex, etc., the full enjoyment of the accommodations. (App. 53-54). The City of Cleveland also sought a ruling that denial of the lease of the public facility to the Nation, for the reason that the Nation proclaimed it would deny entry to women at their

planned event at the Convention Center, did not violate the First Amendment rights of the Nation. (App. 54)

The complaint was removed to the United States District Court for the Northern District of Ohio, Eastern Division ("District Court"), by the Nation on February 1, 1995 and given Case No. 95-CV-250. The Nation filed an answer and counterclaim on February 3, 1995. (App. 34-50). Thereafter, on February 7, 1995, the Nation commenced a separate action for preliminary and permanent injunctive relief in District Court, Case No. 95-CV-286. (App. 21-30). The complaint for preliminary and permanent injunctive relief was almost word for word the same as the counterclaim for preliminary and permanent injunction filed by the Nation. (Compare App. 22-28 with App. 42-48). Both the counterclaim and the Nation's complaint addressed alleged violations of their rights of free speech, assembly and religion under the First and Fourteenth Amendments to the United States Constitution as well as under Article I, §§ 3, 7 and 11 of the Ohio Constitution. (App. 26-28, 46-48).

After consolidation, the District Court, per Judge George W. White, issued a Memorandum and Order on November 1, 1995, entering judgment in favor of Defendant Nation of Islam on the City's complaint for declaratory judgment and the Nation's counterclaim, and granting the requested preliminary and permanent injunctive relief. (App. 10-20). On November 21, 1995, the Nation of Islam moved for an award of attorneys' fees, under 42 U.S.C. § 1988, incurred in defending the declaratory judgment action and pursuing preliminary and permanent injunctive relief. On February 7, 1996, the District Court, in the sound exercise of its discretion, issued a

Memorandum Opinion denying attorneys' fees. (App. 7-9). Judge White ruled the counterclaim and subsequent lawsuit by the Nation were superfluous to the achievement of the ruling obtained by the Nation as the same result would have been achieved by merely defending the City's lawsuit. (App. 9).

The Nation appealed the denial of fees to the United States Court of Appeals for the Sixth Circuit ("Court of Appeals"), Case No. 96-3291. The Court of Appeals reversed the judgment of the District Court and remanded the case for a determination of the appropriate fees to be awarded to the Nation. (App. 1-6). The Court of Appeals ruled the Nation was a "prevailing plaintiff" and that no special circumstances existed to make an award of fees unjust in the case. *Id.*

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Court of Appeals' reversal of the District Court's denial of attorney fees in this case tolls a death knell to what little discretion federal district courts have in deciding whether to award attorneys' fees under 42 U.S.C. § 1988(b) to prevailing parties in civil rights actions.

The plain language of this statute gives discretion to the district courts in deciding whether to award attorney fees to prevailing parties in actions to vindicate constitutional and civil rights. This statute was passed in order to overcome the ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), wherein this Court had affirmed the "American Rule" that each party shall

bear its own attorney's fees unless there exists an express statutory authorization to the contrary. The acknowledged purpose of 42 U.S.C. § 1988, and other civil rights fee shifting statutes, is to ensure effective access to the judicial process for persons with civil rights grievances and to promote vigorous enforcement of the civil rights laws. *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983); *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978); *Hughes v. Rowe,* 449 U.S. 5, 15 (1980). In an effort to promote these goals this Court has severely limited the discretion of the district courts by mandating awards of attorney fees to prevailing plaintiffs unless special circumstances render such an award unjust. *Id.* When it is the defendant that prevails, however, this Court has clearly ruled district courts may exercise their discretion only when they find the plaintiff's claim was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. EEOC,* 434 U.S. at 421-422; *Hughes v. Rowe,* 449 U.S. at 14-15.

In reversing the District Court's refusal to assess attorney's fees against the City, the Court of Appeals directly clashes with the rulings of this Court in *Christiansburg* and *Hughes* by ordering an award of attorney's fees against a plaintiff without even undertaking to assess whether the claims the plaintiff brought were frivolous, unreasonable, or without foundation. Even if the respondents in this case were to be treated as "prevailing plaintiffs", special circumstances exist that would make any award of attorney's fees to the prevailing parties unjust in this case. These are the grounds for granting this request for a writ of certiorari and each is addressed next.

I. The Opinion of the Court of Appeals Conflicts with the Decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

42 U.S.C. § 1988 provides the district courts with discretion to allow the prevailing party reasonable attorney's fees. Although the language of the statute does not distinguish between a prevailing plaintiff and a prevailing defendant, the legislative history and the case law clearly distinguish the two standards. *Tarter v. Raybuck*, 742 F.2d 977, 984 (6th Cir. 1984), *cert. den.*, 471 U.S. 1051 (1985). *See also: Independent Fed. Of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989).

In *Christiansburg Garment Co. v. EEOC, supra,* the standard for awarding attorney's fees to prevailing defendants was delineated. In *Hughes v. Rowe, supra,* the standard in *Christiansburg* was specifically found applicable to civil rights actions brought under 42 U.S.C. § 1983, and subsequent 42 U.S.C. § 1988 claims to recover attorney's fees that follow success in those actions. 449 U.S. at 11; *Tarter v. Raybuck*, 742 F.2d at 955-956. The *Christiansburg* standard is as follows:

> "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422.

In setting this standard, the Court in *Christiansburg* considered whether a different standard for assessing fees against a losing plaintiff should apply where the plaintiff is a governmental entity. This idea was rejected. The Court found, in the case of the Equal Employment Opportunity Commission ("E.E.O.C."), that:

> " . . . although a district court may consider distinctions between the Commission and private plaintiffs in determining the reasonableness of the Commission's litigation efforts, we find no grounds for applying a different general standard whenever the Commission is the losing plaintiff." 434 U.S. at 422-423, n. 20.

In the events leading to the case at bar, the City of Cleveland was faced with a serious civil rights dilemma. It stood in the shoes of the E.E.O.C. as a governmental civil rights plaintiff trying to resolve a difficult conflict between two viable yet conflicting civil rights issues, the First Amendment rights of a religious organization versus de facto gender discrimination. The following stipulated facts from the November 1, 1995, Memorandum and Order of the District Court outline the dilemma. The Nation of Islam sought a lease of the City's Convention Center to hold a free general admission lecture for "men only" to be delivered by Minister Louis Farrakhan. (App. 13). The City put the Nation on notice that state and local civil rights laws[1] prohibit gender discrimination

---

[1] The state public accommodation statute is found in Ohio Revised Code Chapter 4112. The applicable sections herein are Ohio Revised Code 4112.01(A)(9) which defines "place of public accommodation", and Ohio Revised Code 4112.02(G) which outlines the prohibition against discrimination based on gender,

in public accommodations. (App. 14). The City would lease its Convention Center to the Nation provided it, and the Nation, did not violate the public accommodation civil rights laws. *Id.* Both parties acknowledged, and the District Court took notice, that if the City agreed to lease the Convention Center to the Nation for a "men only" event, the City could be subject to a complaint before the Ohio Civil Rights Commission on the basis of gender discrimination under Chapter 4112 of the Ohio Revised Code. (App. 9, 15).

Given the dilemma it faced, the City filed a declaratory judgment action in the Cuyahoga County Court of Common Pleas. The complaint sought clarification from the Court on the conflict between the state and local civil rights laws on public accommodation and the Nation's First Amendment rights. (App. 54-55). The Nation removed the case to federal district court and answered the complaint. The answer incorporated a counterclaim for preliminary and permanent injunction alleging First Amendment free speech, assembly and exercise of religion claims, and similar claims under the Ohio Constitution. (App. 46-48). In order to garner the label of "plaintiff", the Nation filed its own Complaint for Preliminary and Injunctive Relief against petitioner four days

---

among other grounds. The applicable municipal ordinances are § 667.01 and § 667.99 of the City of Cleveland Codified Ordinances. The former ordinance prohibits discrimination based on gender, among other grounds, in managing public accommodations, and goes further than the state statute in extending the prohibition to anyone who aids in or incites the violation of public accommodation rights. The latter imposes a criminal penalty upon the violators.

after filing its answer which was almost a word for word reiteration of the counterclaim filed with the answer. (Compare App. 22-28 with App. 42-48).

The claims in both the Nation's complaint and counterclaim concerned the very issues originally raised in the City's complaint filed in state court. The District Court found the Nation's counterclaim and subsequent lawsuit were superfluous. It found the same result would have been achieved if the Nation had merely defended the City's lawsuit. (App. 9). The District Court made no finding that the claims put forward by the City were frivolous, unreasonable, or groundless. It specifically took notice of the exposure to potential gender discrimination lawsuits the City could face without first obtaining judicial guidance. *Id.* Accordingly, the District Court denied attorney fees to the Nation.

The Court of Appeals reversed the District Court declaring the City was not a civil rights plaintiff without providing any reason whatsoever for this conclusion. (App. 4). It completely disregarded the exposure the City would suffer by granting the Nation's request, which even the Nation acknowledged. The City faced a credible harm which it sought to remedy in Court just as any private plaintiff would. In addition, the City, as a government entity empowered to enforce local, state, and federal rights laws within its borders, had not only the right but the duty to seek judicial guidance to resolve its civil rights dilemma. To let stand the Court of Appeals' superficial analysis is to shut the courthouse door to the government as an active enforcer of civil rights laws. Given the underlying Congressional purpose to have fee awards

serve as an incentive for enforcement of civil rights statutes, it is disheartening that the Court of Appeals refuses to acknowledge that public parties can be enforcers of the civil rights laws in addition to self-interested "private attorney-generals". *See: People of State of New York by Abrams v. 11 Cornwell Co.*, 718 F.2d 22, 24 (2d Cir. 1983).[2]

Having tossed aside the viability of the City as a plaintiff, the Court of Appeals proceeds to categorize the Nation as the true plaintiff in the case. In support of this idea, the Court cuts and pastes language from *Kirchberg v. Feenstra*, 708 F.2d 991 (5th Cir. 1983) – as cited in a Sixth Circuit opinion –, the linchpin case to the Nation's argument they are "plaintiffs" in this case; and a portion of a sentence from *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) which is taken out of context.[3] It argues "§1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented, and a

---

[2] "Though Congress in enacting Section 1988, contemplated primarily suits initiated by private citizens, see S.Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910, we see no reason not to apply the statute as written, especially since an award of attorney's fees to the state can frequently be expected to advance the congressional purpose of enforcing civil rights statutes."

[3] The full sentence in *Farrar* is a quotation from *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) and pertains to *denial* of attorneys fees to a plaintiff. The full cite reads: "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant."

liability on the merits and responsibility for fees go hand in hand." (App. 5). This argument closely resembles the rejected argument of the dissent in *Independent Fed. Of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), which concerned the nearly identical fee-shifting provisions under Title VII. In that case the Court noted:

> "The dissent contends that construing §706(k) in such fashion as to allow competing rights and equities to be taken into account "ignore[s] its express language," (citation omitted), in two ways: first, because "the only party mentioned in §706(k) is 'the prevailing party,' " and thus, "when a district court decides whether to award fees, it must be guided first and foremost by the interests of the prevailing party," (citation omitted). This seems to us to be something less than an "express language" argument – and also a non sequitur. To say that *only* the prevailing party gets fees is not to say that the prevailing party's interests are always first and foremost in determining *whether* he gets them. In any case, as discussed above, we decided long ago that in some circumstances the interests of the losing party *trump* those of the prevailing party under §706(k), so that the latter cannot obtain fees. *Christiansburg Garment, supra.*" 491 U.S. at 760.

Additionally, *Kirchberg* is distinguishable from the case herein. In *Kirchberg*, the Fifth Circuit Court of Appeals concluded that Congress intended that nominal defendants should ordinarily recover attorneys' fees, unless special circumstances would render such an award unjust, *when they prevailed on constitutional claims that they themselves brought. Kirchberg v. Feenstra*, 708 F.2d 991, 996 (5th Cir. 1983) [emphasis added]. The First Amendment

claims in the case at bar were made by the City in the original complaint in state court. (App. 53-55). As the District Court found, the counterclaim and the complaint subsequently filed by the Nation were unnecessary to obtain the ultimate relief sought in the litigation. (App. 8-9).

The award of fees to a prevailing defendant under §1988, and similar fee-shifting statutes in the civil rights universe, is clearly within the discretion of the District Court as it has the superior knowledge of the facts. *Pierce v. Underwood*, 487 U.S. 522, 560 (1988)[4]; *Maag v. Wessler*, 993 F.2d 718, 720 (9th Cir. 1993). This axiom is clearly supported by the events in the case at bar. The District Court, looking at all the facts, circumstances, and equities in the case utilized its discretion and found the Nation did not merit an award of attorney's fees. The Court of Appeals improperly disturbed the District Court's sound exercise of discretion by completely disregarding the clear precedent of *Christiansburg* and *Hughes*. Accordingly, this Court should either grant review of the Opinion or summarily reverse it.

---

[4] In discussion of whether to award attorney's fees under the Equal Access to Justice Act, the Court in *Pierce* found: "Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the District Court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified . . . " 487 U.S. at 560.

II. Imposition of a prevailing party's attorney's fees upon a losing government party in a civil rights action, commenced by the government party in order to obtain judicial interpretation of conflicting constitutional and civil rights claims, results in an unreasonable and unjust restraint to the vigorous enforcement of the Civil Rights Acts advocated by this Court and by the legislature.

It is well settled that a prevailing plaintiff should ordinarily recover an attorney's fee, under 42 U.S.C. § 1988, unless special circumstances would render such an award unjust. *Hensley v. Eckerhart*, 461 U.S. at 429; S.Rep. No. 94-10-11, p. 4 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Even if we were to accept the conclusions of the Court of Appeals that the Nation was a "prevailing plaintiff" in this litigation and the City the "losing defendant", the facts of the case give rise to special circumstances which would render the award of attorney's fees to the Nation unjust.

Special circumstances that would render the award of fees to prevailing plaintiffs unjust have not been clearly identified by this Court or found in the legislative history leading to the passage of 42 U.S.C. § 1988. However, we can turn for guidance to the legislative history of the Equal Access to Justice Act, and its fee-shifting provisions in civil rights cases which involve the United States Government. Under these provisions a court must award attorney's fees to a prevailing party, other than the United States, unless the court finds that the position of the United States was substantially justified or that

special circumstances make an award unjust. 42 U.S.C. § 2412(d)(1)(A). In the legislative history of this statute the terms "substantial justification" and "special circumstances" are addressed separately. As to "special circumstances" the legislature declared:

> " . . . the Government should not be held liable where "special circumstances would make an award unjust". This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made." H.Rep. No. 1418, 96th Cong., 2d Sess., at p. 11, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4990.

In the case at bar the City initiated a declaratory judgment action in order to seek guidance from the courts in interpreting a conflict between issues of First Amendment rights of religion, free speech, and assembly; and equally valid issues relating to gender discrimination in public accommodations. Given the need to resolve this conflict as part of its government functions, it is inconceivable that the City is now penalized with assessment of the Nation's fees, especially when all parties have acknowledged, and the District Court recognized, that had the City decided to grant the lease to the Nation upon request it could face legal exposure for gender discrimination. (App. 9, 15). If they lost on those charges, under the Court of Appeals' analysis, the City would also have to pay the prevailing party's attorney's fees. The City is thereby caught between a rock and a hard place.

The case history involving this particular situation, or an analogous one, in 42 U.S.C. § 1988 setting is sparse. In *Society of Professional Journalists, Headliners Chapter v. Briggs*, 687 F.Supp. 1521 (D. Utah 1988), the situation presented involved a prevailing private plaintiff, an organization of journalists, who had filed a civil rights suit to obtain a copy of a settlement agreement executed in an action arising out of the alleged wrongdoing of public officials. The court in that case ruled that special circumstances existed rendering an award of attorney's fees under § 1988 unjust. The court found that the defendant public officials were caught in a squeeze play as they were powerless to provide the remedy requested without breaching the settlement contract, which required the parties to the contract to keep the settlement agreement confidential. If the public officials had provided a copy of the settlement agreement, as requested by the plaintiffs, they would face "substantial damages". 687 F.Supp at 1525.

The congressional purpose in providing attorney's fees in civil rights cases is not only to eliminate financial barriers to enable "private attorney generals" to vindicate constitutional rights, it is also to stimulate voluntary compliance with the law and the vigorous enforcement of the civil rights laws. *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 422; *Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). It is the governments of this land, federal, state and local, that are the leading defenders of the constitution and primary enforcers of the civil rights laws. The legislative history acknowledges that enforcement of the laws depends on governmental action and, in

some cases, on private action through the courts. S.Rep. No. 94-1011 (1976) *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. If the holding of the Court of Appeals is permitted to stand, it would constitute an unreasonable and unjust restraint on the fundamental policies espoused by this Court and the legislature with regards to vigorous enforcement of the Civil Rights Acts by the governments of the lands.

Even were we to disregard this Court's holding in *Christiansburg*, as the Court of appeals did, and label the City a defendant and the Nation of Islam a plaintiff, thereby exposing the City to the expansive attorney fee-shifting rule set forth in *Hensley v. Eckerhart*, the facts of this case create a special circumstance which would render an award against the City unjust so as to preclude an award of attorney's fees to the Nation of Islam. Accordingly, this Court should either grant review of the Opinion of the Court of Appeals or summarily reverse it.

CONCLUSION

Under 42 U.S.C. § 1988 the attorney's fees of a prevailing defendant in a civil rights suit may not be assessed against the losing plaintiff unless the court finds that the claims were frivolous, unreasonable or groundless. There has been no finding by any court that the suit for declaratory judgment brought by the City of Cleveland against the Nation of Islam was frivolous, unreasonable, or without foundation. In fact, the District Court refused to assess the Nation of Islam's attorney's fees against the City finding the City's filing of the lawsuit to be the primary reason

the Nation of Islam obtained relief. The Court of Appeals' opinion completely disregarded the long standing ruling of this Court in *Christiansburg* and substituted its judgment for that of the District Court. Even if this error by the Court of appeals is overlooked, and the City is considered as a "losing defendant" subject to assessment of a "prevailing plaintiff's" attorney's fees, special circumstances exist to make the imposition of the Nation's fees on the City unjust. To impose fees on the City in the situation presented herein, wherein the City attempted to resolve a conflict between constitutional and civil rights laws by filing a declaratory judgment action, or else face litigation from "private attorney generals" espousing opposing viewpoints, would create a catastrophic precedent. It would place the City's valid civil rights enforcement efforts under unreasonable and unjust restraints, subject to profligate tactics from fee-chasing private parties on opposing sides of an issue with an eye to cash in on the attorney's fees at the end of litigation.

Accordingly, Petitioner requests that this Court either grant their petition for a writ of certiorari or summarily reverse the ruling below.

Respectfully submitted,

SHARON SOBOL JORDAN
Director of Law
City of Cleveland
601 Lakeside Avenue,
Room 106
Cleveland, Ohio 44114-1077
(216) 664-2675
Attorney for Petitioner

CHARLES E. HANNAN, JR.
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue,
Room 106
Cleveland, Ohio 44114-1077
(216) 664-4333
Counsel of Record

NOT RECOMMENDED FOR PUBLICATION

NO. 96-3291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF CLEVELAND, Plaintiff/Counter Defendant-Appellee, V. NATION OF ISLAM, Defendant/Counter Claimant-Appellant. and MUHAMMAD'S MOSQUE No. 18 and ROLAND MUHAMMAD, Minister, Plaintiffs-Appellant, V. CITY OF CLEVELAND, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO (Consolidated Appeal) (Filed Aug. 15, 1997)

BEFORE: RYAN and DAUGHTREY, Circuit Judges, and FRIEDMAN, District Judge.*

PER CURIAM. This dispute over the appropriateness of an award of attorneys' fees stems from the Nation of

---

* The Hon. Bernard A. Friedman, United States District Judge for the Eastern District of Michigan, sitting by designation.

Islam's attempt to lease the City of Cleveland's Convention Center for a "men-only program" – an attempt that the City resisted, citing state and local anti-discrimination laws. When the City filed suit for declaratory relief in state court, the Nation of Islam removed the action to federal court, where it counterclaimed, based on 42 U.S.C. § 1983. Successful on the merits, the Nation of Islam then sought attorneys' fees under 42 U.S.C. § 1988. The district court denied the motion for fees, incorrectly we conclude, and we therefore reverse and remand for a determination of the proper fee award.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1994, Minister Roland Muhammad's local Nation of Islam organization inquired into the availability of Cleveland's Convention Center for a free lecture by Louis Farrakhan to an audience restricted to men. City officials informed Muhammad that city and state laws prohibit gender discrimination in public accommodations and that a lease of the Convention Center would require the Nation of Islam to abide by a non-discriminatory policy. When the ensuing negotiations faltered and the Nation of Islam threatened to sue the City for violating its First Amendment rights by denying access to the Convention Center, the City filed a declaratory judgment action against the Nation of Islam in state court, seeking a declaration that the Nation of Islam's men-only event would violate state law. The Nation of Islam removed the action to federal court and counterclaimed, asserting its First Amendment rights. Soon thereafter, Muhammad's Mosque No. 18 and its minister, Roland Muhammad, initiated a federal court action for injunctive relief to

obtain access to the Convention Center. After the two suits were consolidated, the district court entered judgment for the Nation of Islam, and the city did not appeal. The National of Islam, the Mosque, and Minister Muhammad requested attorneys' fees under 42 U.S.C. § 1988, but the district court denied their request. In this appeal, they challenged that order.

ANALYSIS

This court reviews the denial of a motion for attorneys' fees under 42 U.S.C. § 1988 for abuse of discretion. *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir. 1995). In an action to enforce rights under § 1983, the award of "a reasonable attorney's fee" to "the prevailing party" under § 1988 is ostensibly discretionary with the district court. However, as this court has noted, Supreme Court precedent indicates that although it is within the court's discretion to award attorney's fees under section 1988, "in the absence of special circumstances a district court not merely 'may' but *must* award fees to the *prevailing plaintiff.*" *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272 (6th Cir. 1991) (first emphasis in original; second emphasis added) (citing *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989)).

In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Supreme Court "reemphasized that the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Id.* at 111 (internal quotation marks, brackets, and citation omitted). This requisite "alteration" may be evidenced by "an enforceable judgment against the [party] from whom fees are sought,

or comparable relief through a consent decree or settlement." *Id.* (citation omitted). In this case, a formal judgment plainly establishes that the Nation of Islam was the prevailing party in a civil rights dispute. The next critical question, then, is whether the Nation of Islam should be considered a prevailing plaintiff or a prevailing defendant. *See generally Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 418-21 (1978).

The City's original suit sought a declaration that the Nation of Islam's men-only event would violate Ohio law and that denial of the lease would not violate the Nation of Islam's First Amendment rights; the City was thus not a civil rights plaintiff. The Nation of Islam, on the other hand, entered the fray as a counter-claimant, asserting its civil rights under 42 U.S.C. § 1983. Under the circumstances of this case, therefore, the Nation of Islam's nominal status as a defendant should not stand in the way of its role as the party that "invoke[d] and thereby invigorate[d] [a] federal constitutional . . . right[]." *Geier v. Richardson*, 871 F.2d 1310, 1313 (6th Cir. 1989) (internal quotation marks and citation omitted). Section "1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented," *Americans United for Separation of Church and State v. School Dist.*, 835 F.2d 627, 631 (6th Cir. 1987) (citing *Kirchberg v. Feenstra*, 708 F.2d 991, 999-1000 (5th Cir. 1983)), and "liability on the merits and responsibility for fees go hand in hand," *Farrar*, 506 U.S. at 109 (internal quotation marks, brackets, and citation omitted).

Having concluded that the Nation of Islam should thus be considered a prevailing plaintiff before the district court, we reiterate that attorney's fees should be awarded absent "special circumstances" justifying a denial of such payment. *Morscott*, 936 F.2d at 272. On appeal, the City urges that its good faith belief that it would violate sex discrimination laws if it leased the Convention Center to the Nation of Islam constitutes a special circumstance sufficient to justify relief from its § 1988 responsibilities. Such an argument flies in the face of our prior decisions. We have previously held that a party's "good faith" is not a special circumstance that justifies a denial of attorney's fees. *Id.* at 273. This rule applies even where a losing party, like the City, reasonably feels that its discriminatory actions were compelled by law. *See, e.g., Phelan v. Bell*, 8 F.3d 369, 373 (6th Cir. 1993); *Espino v. Besteiro*, 708 F.2d 1002, 1005 (5th Cir. 1983). Thus, because no special circumstances would make an award of attorney's fees unjust in this matter, we conclude that the district court erred in denying the Nation of Islam's request for such payment.

The resolution of this case has important policy implications. Were we to deny the Nation of Islam fees because of its status as nominal defendant in the original suit, future disputes with constitutional implications might well result in parties rushing to the courthouse, eager to achieve plaintiff status. The government, by quickly filing declaratory judgment actions when faced with possible constitutional challenges, would be able to avoid the application of 42 U.S.C. § 1988, and civil rights enforcement would be weakened without the hope of the recovery of fees.

For the reasons set out above, we REVERSE the judgment of the district court and REMAND for a determination of the appropriate fee to be awarded to the appellants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND, Plaintiff, vs. NATION OF ISLAM, Defendant/Counterclaimant.	CASE NO. 1:95 CV 0250 JUDGE GEORGE W. WHITE
MUHAMMAD'S MOSQUE NO. 18 and MINISTER ROLAND MUHAMMAD, Plaintiffs, vs. CITY OF CLEVELAND, Defendant.	CASE NO. 1:95 CV 0286 JUDGE GEORGE W. WHITE MEMORANDUM OPINION (Filed Feb. 7, 1996)

On November 1, 1995, the Court granted the Nation of Islam's request for preliminary and permanent injunction in consolidated cases, 1:95CV250 and 1:95CV286. The City of Cleveland had first filed a declaratory judgment action requesting a determination whether it was required to lease the Cleveland Convention Center to the Nation of Islam for a men only meeting. The Court ruled that the City must lease the Cleveland Convention Center for a men only address by the Nation of Islam's leader, Minister Louis Farrakhan. This matter is now before the

Court upon the Nation of Islam's motion for attorney fees pursuant to 42 U.S.C. § 1988.

42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

A prevailing party in a civil rights action is entitled to reasonable attorney fees as part of the costs of his case. *A.J. by L.B. v. Kierst*, 56 F.3d 849, 863 (8th Cir. 1995). The Court has some discretion to deny attorney fees but should not do so unless there are special circumstances. *Ross v. Horn*, 598 F.2d 1312, 1322 (3rd Cir. 1979), *cert. denied*, 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980). If the Nation of Islam's case was not a catalyst for the vindication of its constitutional rights, exceptional circumstances would exist for denial of attorney fees. *Webster v. Sowders*, 846 F.2d 1032, 1037 (6th Cir. 1988); *Staten v. Housing Authority of the City of Pittsburgh*, 638 F.2d 599, 605 (3rd Cir. 1980); *Ross v. Horn*, 598 F.2d at 1322.

The Court finds that the Nation of Islam's lawsuit, 1:95CV286 was not the catalyst for the injunctive relief it received. The City filed its action for declaratory judgment on the issue involved in the consolidated cases first. In response to the City's action, the Nation of Islam filed

its answer and counterclaim. It later filed an action for injunctive relief. The declaratory judgment action started the entire litigation. The City could have been sued by women who wanted to attend the meeting and it believed that it was necessary to allow a court to decide the issue. The Nation of Islam's counterclaim and subsequent lawsuit did not have a catalytic effect in that it was not a necessary factor in obtaining the ultimate relief. The same result would have been achieved by defending the City's lawsuit. The City was acting in good faith in filing its action for declaratory judgment.

Accordingly, the motion of the Nation of Islam for attorney fees is denied.

IT IS SO ORDERED.

/s/ George W. White
George W. White
Chief Judge
UNITED STATES
DISTRICT COURT

WHITE, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND, Plaintiff v. NATION OF ISLAM, Defendant/Counterclaimant	)	CASE NO. 1:95cv0250
MUHAMMAD'S MOSQUE NO. 18 and MINISTER ROLAND MUHAMMAD, Plaintiffs v. CITY OF CLEVELAND, Defendant	)	CASE NO. 1:95cv0286 **ORDER** (Filed Nov. 1, 1995)

Pursuant to this Court's Memorandum and order filed contemporaneously with this Order,

IT IS ORDERED that judgment is for the Nation of Islam on its counterclaim in Case No. 1:95cv0250. The Nation of Islam's motion for preliminary and permanent injunction in Case No. 1:95cv0286 is also granted.

The City of Cleveland shall lease its Convention Center to the Nation of Islam for a "men only" address by

Minister Louis Farrakhan in accordance with this Memorandum.

IT IS SO ORDERED.

/s/ George W. White
George W. White
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND, Plaintiff, vs. NATION OF ISLAM, Defendant/ Counterclaimant.	CASE NO. 1:95 CV 0250 JUDGE GEORGE W. WHITE
MUHAMMAD'S MOSQUE NO. 18 and MINISTER ROLAND MUHAMMAD, Plaintiffs, vs. CITY OF CLEVELAND, Defendant.	CASE NO. 1:95 CV 0286 JUDGE GEORGE W. WHITE MEMORANDUM AND ORDER (Filed Nov. 1, 1995)

The city of Cleveland had filed an action for declaratory judgment in the Court of Common Pleas of Cuyahoga County, Ohio concerning the Nation of Islam's, through its Local Mosque No. 18, desire to rent the Cleveland Convention Center for a men-only event. The City of Cleveland sought a declaration that an event for men only at the Cleveland Convention Center would violate Ohio Revised Code Section 4112.02(G) and Section 667.01 of the Codified Ordinances of Cleveland, Ohio and that the denial of the facility to the Nation of Islam under circumstances where it intends to deny entry to women

does not violate the First Amendment to the United States Constitution. The Nation of Islam caused the case to be removed on grounds that it involved a federal question. Two days after the action was removed to federal court the Nation of Islam filed an action for preliminary and permanent injunction that was similar to its counterclaim in the City's action. The Nation of Islam asserted that refusing to lease the Cleveland Convention Center for a men-only event violated its rights under the First Amendment and Article I, §§3, 7 and 11 of the Ohio Constitution. The cases have been consolidated. The parties have agreed that oral argument is unnecessary.

The parties have stipulated to the following facts:

1. In these consolidated cases, Defendant/Counterclaimant National of Islam (No. 1:95 CV 0250) and Plaintiffs Muhammad's Mosque No. 18 and Minister Roland Muhammad (Case No. 1:95 CV 0286) – referred to collectively herein as "the Nation" – seek preliminary and permanent injunctive relief against the City of Cleveland ("the City") in order to obtain access to the City's Convention Center, Public Hall Auditorium (the "Convention Center") for a "men only" address by the Nations's leader, Minister Louis Farrakhan.

2. On September 20, 1994, Minister Roland Muhammad, on behalf of the Nation, inquired about the availability of the Convention Center for a free general admission lecture to be delivered by Minister Louis Farrakhan to a "men only" audience comprised of both members of the Nation and non-members.

3. On October 6, 1994, the City's Director of Parks Recreation and Properties, Oliver B. Spellman, Jr., and

other City officials met with representatives of the Nation, including Minister Muhammad, concerning the Nation's proposal to lease the Convention Center for an event that was to be conducted for "men only."

4. As a result of the October 6, 1994 meeting, on October 19, 1994, Director Oliver Spellman wrote a letter to Minister Muhammad to apprise him that Ohio Revised Code Chapter 4112 and Section 667.01 of the Codified Ordinances of the City of Cleveland prohibit discrimination in public accommodations on the basis of sex and other specified grounds.

5. Director Spellman's October 19, 1994, letter also informed Minister Muhammad that the City would lease its Convention Center to the Nation, provided that it is not the Nation's intent to violate the public accommodation laws of the State of Ohio or City of Cleveland.

6. The Nation adheres to a tradition, now more than 60 years old, under which its ministers deliver separate addresses each week to their male and female constituents. For more than 60 years, the Nation has reserved Saturday mornings for "women only" meetings. Likewise, for more than 60 years, the Nation has reserved Monday evenings for the "men only" meetings.

7. Earlier in 1994, the City twice permitted the Billy Graham Crusade to hold events at the Convention Center that were promoted as single-gender events. Although the Billy Graham Women's Crusade held what was promoted as a women's event on February 25, 1994, and the Billy Graham Men's Crusade held what was promoted as a men's event on March 12, 1994, members of the opposite sex were granted entry to these meetings.

8. If the City agrees to lease the Convention Center to the Nation for a "men only" event as requested, then the City may be subjected to a complaint before the Ohio Civil Rights Commission on the basis of gender discrimination under Chapter 4112 of the Ohio Revised Code, or the initiation of a lawsuit under the same Chapter. Such a complaint may be filed by any person alleging to be aggrieved.

9. In addition, Section 667.01 of Cleveland's Codified Ordinances prohibits discrimination by any person, including the proprietor of a public facility, on the basis of gender and other grounds, and subjects the violator to a criminal fine and/or imprisonment.

10. Because the City was confronted with either a potential law suit from the Nation for an alleged violation of the Nation's First Amendment rights, or legal proceedings by any person alleging to be aggrieved on the basis of gender discrimination contrary to Chapter 4112 of the Ohio Revised Code or Section 667.01 of the City of Cleveland Codified Ordinances, on January 4, 1995, the City filed a Complaint for Declaratory Judgment in the Court of Common Pleas, Cuyahoga County (Case CV-282998).

11. The City's Declaratory Judgment seeks a declaration that conducting an event for "men only" at the Convention Center would constitute a violation of Ohio Revised Code Chapter 4112 and Section 667.01 of the Codified Ordinances of Cleveland, Ohio, and that the denial of the facility to the Nation under circumstances where it intends to deny entry to women does not violate the First Amendment rights of the Nation of Islam.

12. On August 30, 1994, during a case management conference, the City proposed to make its Convention Center available to the nation under the same terms previously enjoyed by the Billy Graham Crusade: including, *inter alia*, the freedom to promote its event as a "men only" meeting, but a concomitant requirement that women who come to the event not be barred at the door.

13. Because the Nation does not wish to compromise its religious tradition as the price for access to the Convention Center, it continues to seek declaratory and injunctive relief permitting it to restrict the event to an all-male audience.

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech . . . " It is made applicable to the States by the Fourteenth Amendment. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081-82, 31 L.Ed.2d 263 (1972); *Lambs Chapel v. Center Moriches Union Free School District*,___U.S.___, 113 S.Ct. 2141, 2144, 124 L.Ed.2d 352 (1993). The government can control access to a nonpublic forum based on subject matter and speaker identify as long as the distinctions made are reasonable and are viewpoint neutral. *Id.* 113 S.Ct. at 2147. A speaker with a religious message is entitled to the same access given to speakers whose message is nonreligious. *Id.* at 2148, *Pinette v. Capitol Square Review and Advisory Board*. 30 F.3d 675, 678 (6th Cir. 1994), affirmed 115 S.Ct. 2440 (1995). Speech cannot be regulated when the motivating ideology or the opinion of the speaker is the reason for the restriction. *Rosenberger v.*

Rector and Visitors of the University of Virginia,___U.S.___, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995).

The United States Supreme Court recently decided *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,___U.S.___, 115 S.Ct. 2338 (1995). In *Hurley*, gay lesbian and bisexual descendants of Irish immigrants joined together to form an organization called GLIB specifically to march in the annual St. Patrick's Day parade. The City of Boston authorized the South Boston Allied War Veterans Council (Council) to organize and conduct the parade. The Council denied GLIB's application to march. GLIB then filed a lawsuit in state court alleging that the denial of its application to march violated a state law prohibiting discrimination on account of sexual orientation in places of public accommodation. The state trial court ruled that the parade fell within the definition of a public accommodation. The Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who merely showed up at the parade and did not generally inquire into the specific messages or views of the applicants. Thus, the parade was found to be a public event. The Council had asserted that the exclusion of groups with sexual themes strengthened the fact that the parade expressed traditional religious and social values. The trial court determined that GLIB was excluded because of its sexual orientation, violating the public accommodations law and that a St. Patrick's Day celebration requires diversity and inclusiveness.

The trial court further found that because of the Council's lack of selectivity in choosing participants and

failure to constrict the marchers' message, there was no specific expressive purpose entitling the parade to First Amendment protection. The public accommodation statute did not require admission of GLIB but only prohibited sexual discrimination and any infringement on the Council's freedom of speech was only incidental and no greater than necessary to accomplish the statute's legitimate purpose. The Supreme Court of Massachusetts affirmed the trial court's decision.

The United States Supreme Court, in reversing the state court decision, held that a parade is a form of expression protected by the First Amendment. *Id.* at 2345. Parades convey all sorts of messages. *Id.* GLIB's participation as a unit was for the purpose of celebrating its members identity as openly gay or lesbian descendants of Irish immigrants, to show there are such individuals in the community and to support others like themselves who sought to march in the New York parade. *Id.* at 2346.

Each participating unit affected the message conveyed by the Council so the state court's use of the public accommodation statute required the Council to alter the expressive content of the parade. *Id.* at 2347. The Supreme Court noted that the state court's application of the statute had the effect of declaring the Council's speech itself to be the public accommodation. Then any protected individuals would have the right to participate so that any message produced by the Council would be shaped by anyone who wanted to join. *Id.* All speech involves choices of what to say or not say and a fundamental rule under the First Amendment is that one who speaks may decide what not to say. *Id.* A speaker does not have to propound a particular point of view and the government

does not have the power to control that choice. *Id.* at 2348.

In the present case the City of Cleveland is attempting to use a human rights statute to justify interference with the content of a private speaker's message. Minister Farrakhan wishes to adhere to a 60 year religious tradition wherein the Nation of Islam Ministers deliver separate speeches to men and women. There is one message for male constituents, another for female constituents. If the City is allowed to make the public accommodation law requiring Minister Farrakhan to speak to a mixed audience, the content and character of the speech will necessarily be changed. The City would then be regulating private speech which would be a violation of the First Amendment.

The City of Cleveland would not be liable if the Nation of Islam was cited for violation of the public accommodation law. As a lessor, the City would not be responsible for the torts of a tenant in which it does not participate. *Kesecker v. U.S. Dept. of Energy*, 679 F.Supp. 726, 729 (S.D. Ohio 1988). Furthermore, Ohio Revised Code Section 4112.02(G) makes it unlawful discriminatory practice for a proprietor, employee, keeper or manager of a place of public accommodation to discriminate. It does not bar discrimination by a lessee. Thus, the Court finds that the Nation of Islam has shown a substantial likelihood of success on the merits.

Accordingly, judgment is for the Nation of Islam on its counterclaim in Case No. 1:95CV0250. The Nation of Islam's's motion for preliminary and permanent injunction in Case No. 1:95CV0286 is also granted. The City of

Cleveland shall lease its Convention Center to the Nation of Islam for a "men only" address by Minister Louis Farrakhan in accordance with this Memorandum.

IT IS SO ORDERED.

/s/ George W. White
George W. White
Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MUHAMMAD'S MOSQUE NO. 18	)	
and	)	CASE NO. 1:95CV 0286
MINISTER ROLAND MUHAMMAD,	)	JUDGE JUDGE MANOS
Plaintiffs,	)	MAG. JUDGE HEMANN
v.	)	
CITY OF CLEVELAND,	)	
Defendant.	)	

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

(Filed Feb. 7, 1995)

I. INTRODUCTION

1. The Plaintiffs, Minister Roland Muhammad and Muhammad's Mosque No. 18, are local representatives of a religious organization known as the Nation of Islam ("the Nation"). They bring this civil action for preliminary and permanent injunctive relief against Defendant City of Cleveland ("the City") in order to obtain access to the City's Convention Center for a "men only" address by the Nation's leader, Minister Louis Farrakhan. The City has steadfastly refused to lease its Convention Center to Plaintiffs for a single-gender event – even though, less than a year ago, the City twice permitted the Billy Graham Crusade to hold single-gender events at that very facility. Plaintiffs bring this action to obtain an

injunction requiring the City to lease them the Convention Center in accordance with the same fees and requirements that the City imposes on any other group seeking access to the Center.

2. In order:

(a) to prevent the City from using "concerns" about gender discrimination as a pretext for denying a forum to a controversial speaker;

(b) to prevent the City – when acting in its role as proprietor, leasing a municipally-owned facility for a private event – from treating the Billy Graham Crusade more favorably than the Nation of Islam;

(c) to vindicate Minister Farrakhan's First Amendment freedom, when speaking at a private event, to determine *who* will be on the receiving end of his religious and political message; and

(d) to prevent the City from imposing, as the price for access to its Convention Center, a requirement that the Nation compromise its religious traditions – specifically, the Nation's 60-year-old tradition of holding men-only and women-only meetings on Monday and Saturday nights, respectively;

Plaintiffs pray that this Court grant them preliminary and permanent injunctive relief.

II. JURISDICTION, VENUE, AND PARTIES

A. Jurisdiction

3. Plaintiffs bring this action to protect rights conferred by the First and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 3, 7, and 11 of the Ohio Constitution.

4. This Court has jurisdiction under 28 U.S.C. § 1331, in that the action arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of State authority, of the rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that its purpose is to secure equitable relief under Acts of Congress – specifically, 42 U.S.C. § 1983 – providing for the protection of civil rights; and, finally, as to our claims under the Ohio Constitution, under the doctrine of pendent jurisdiction.

B. Venue

5. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the Defendant is situated in this District and because Plaintiffs' claims arose here.

C. Parties

6. The Plaintiffs, Minister Roland Muhammad and Muhammad's Mosque No. 18, are local representatives of the Nation of Islam – a religious organization, led by Minister Louis Farrakhan, with affiliated mosques in major cities throughout the United States. Plaintiffs are the real parties in interest here because they sought to

lease the Convention Center; they stood ready, willing, and able to pay the requisite fee; they were the parties whose request was rejected by the City; and they are the parties who seek, by means of the requested injunction, to lease the Convention Center.

7. Defendant City of Cleveland is a charter municipality organized pursuant to the Home Rule provisions of Article XVIII, § 7 of the Ohio Constitution.

III. FACTS

8. The Nation's religious teachings include the notion that men and women play distinct roles in Islamic culture. For this reason, the Nation has a 60-year-old tradition in which, once a week, its ministers deliver *separate* addresses to their male and female constituents. For 60 years, Saturday night has been reserved for "women only" meetings. Likewise, for 60 years, Monday night has been reserved for "men only" meetings. Three additional meetings are conducted mid-week in which male and female constituents are equally welcome.

9. The Nation's leader, Minister Louis Farrakhan, frequently travels throughout the United States, delivering speeches to Nation members and others who are interested in hearing his religious and political message. These speeches are private events, staged in facilities – municipally-owned or otherwise – that are leased by representatives of the local mosque. Attendance is normally free of charge – but, consistent with the Nation's 60-year tradition, his Monday and Saturday night speeches are restricted to male and female audiences, respectively.

10. Minister Roland Muhammad, who heads the local mosque in Cleveland, decided to organize a Monday night event in which Minister Farrakhan would deliver a "men only" address. On September 20, 1994, he wrote to the Cleveland Convention Center's Marketing Department, inquiring whether the Public Hall Auditorium would be available for such an event on "any Monday in November or December." (A copy of that letter is attached to this Complaint as "Exhibit A.")

11. A representative of the Marketing Department, Mr. Tony Scott, replied by telephone. He insisted upon a face-to-face meeting between Minister Muhammad and Oliver B. Spellman, Jr., the Convention Center's Director.

12. That meeting was held on October 6 at the Convention Center. Attending on behalf of the City were Mr. Spellman; Letcher Eley, an attorney in the City's Law Department; Susie A. Claytor, the Convention Center's Assistant Director; and Sam Thomas, the City's Director of Community Relations.

13. At that meeting, Mr. Spellman stated that "under no circumstances" would the City permit the Convention Center to be used for an all-male event. He subsequently reiterated this position in an October 19 letter to Minister Muhammad. In that letter (which is attached to this Complaint as "Exhibit B"), Mr. Spellman asserted that it would be unlawful for the City to permit the single-gender use of "a place of public accommodation."

14. Plaintiffs subsequently discovered, however, that, earlier in 1994, the City twice permitted the Billy

Graham Crusade to hold single-gender events at the Convention Center. This information was obtained from the Convention Center's own Marketing Department. On February 25, the Billy Graham Women's Crusade held what was promoted as an all-female event. On March 12, the Billy Graham Men's Crusade held what was promoted as an all-male event.

15. When Plaintiffs' lawyers confronted City officials with the Billy Graham facts and requested comparable access to the Convention Center, the City responded by asking repeatedly for more time – and then, without warning, filed suit against the Nation in state court. That action has now been removed to federal court, where it is captioned: *City of Cleveland v. Nation of Islam*, Case No. 1:95-CV-0250 (N.D. Ohio) (White, J.). Minister Muhammad and Muhammad's Mosque No. 18 bring this action separately because they are the real parties in interest in this dispute. They will promptly move to consolidate the two lawsuits before one federal judge.

IV. CLAIMS FOR RELIEF

COUNT I

(Federal Speech and Assembly Claims Under the First Amendment)

16. Plaintiffs incorporate the allegations in paragraphs 1 through 15 of this Complaint as if fully rewritten herein.

17. By refusing to lease its Convention Center to Plaintiffs for a "men only" address by Minister Louis Farrakhan, the City has violated Plaintiffs' free speech

and assembly rights under the First and Fourteenth Amendments to the U.S. Constitution.

COUNT II

(Pendent Speech and Assembly Claims Under the Ohio Constitution)

18. Plaintiffs incorporate the allegations in paragraphs 1 through 17 of this Complaint as if fully rewritten herein.

19. By refusing to lease its Convention Center to Plaintiffs for a "men only" address by Minister Louis Farrakhan, the City has violated Plaintiffs' free speech and assembly rights under Article I, §§ 3 and 11 of the Ohio Constitution.

COUNT III

(Federal Free Exercise Claim Under the First Amendment)

20. Plaintiffs incorporate the allegations in paragraphs 1 through 19 of this Complaint as if fully rewritten herein.

21. By refusing to lease its Convention Center to Plaintiffs for a "men only" address by Minister Louis Farrakhan, the City has violated Plaintiffs' right to free exercise of religion under the First and Fourteenth Amendments to the U.S. Constitution.

COUNT IV

(Pendent Free Exercise Claim Under the Ohio Constitution)

22. Plaintiffs incorporate the allegations in paragraphs 1 through 21 of this Complaint as if fully rewritten herein.

23. By refusing to lease its Convention Center to Plaintiffs for a "men only" address by Minister Louis Farrakhan, the City has violated Plaintiffs' religious freedom and freedom of conscience under Article I, § 7 of the Ohio Constitution.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that judgment be entered against the City of Cleveland. Specifically, Plaintiffs demand such injunctive and other relief as follows:

(a) Preliminary and permanent injunctions ordering the City – and all officers, employees, and agents under its supervision or control – to lease the Cleveland Convention Center to Plaintiffs for a "men only" address by Minister Louis Farrakhan, to be scheduled for a mutually convenient date and time, under the same terms and conditions that the City imposes on any other group seeking access to the Convention Center.

(b) An award of attorney fees, pursuant to 42 U.S.C. § 1988, and costs.

(c) An order granting Plaintiffs such other and further relief as this Court deems proper.

Respectfully submitted,

/s/ Kevin Francis O'Neill
KEVIN FRANCIS O'NEILL
(0010481)
Legal Director
American Civil Liberties Union
of Ohio Foundation, Inc.
1223 West Sixth Street
Cleveland, Ohio 44113-1353
(216) 781-8639

SCOTT GREENWOOD (0042558)
ACLU Cooperating Attorney
Greenwood & Hudson
2301 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 684-0101

RAYMOND VASVARI (0055538)
ACLU Cooperating Attorney
1300 Bank One Center
600 Superior Avenue East
Cleveland, Ohio 44114-2650
(216) 522-1925

GINO SCARSELLI (0062327)
ACLU Cooperating Attorney
Berkman, Gordon, Murray,
Palda & DeVan
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorneys for Plaintiffs on behalf
of the American Civil Liberties
Union of Ohio Foundation, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Complaint for Preliminary and Permanent Injunctive Relief was served by regular U.S. mail upon Steven J. Terry, Chief Counsel, Department of Law, and Heather Graham-Oliver, Chief Assistant Director of Law, City Hall, Room 106, 601 Lakeside Avenue, Cleveland, Ohio 44114, counsel for Defendant City of Cleveland, this 7th day of February, 1995.

/s/ Kevin Francis O'Neill
KEVIN FRANCIS O'NEILL

The Nation of Islam

In the Name of Allah [LOGO]

14402-06 Kinsman Road
Cleveland, Ohio 44120
(216) 751-7736

IN THE NAME OF ALLAH, THE BENEFICENT, THE MERCIFUL I BEAR WITNESS THAT THERE IS NO GOD BUT ALLAH AND I BEAR WITNESS THAT MUHAMMAD IS HIS MESSENGER.

AS-SALAAM ALAIKUM

September 20, 1994

Mr. Tony Scott
Marketing
Cleveland Convention Center
500 Lakeside Avenue
Cleveland, Ohio 44114

Dear Mr. Scott:

We would like to inquire availability of the Cleveland Convention Center, Public Hall Auditorium for any Monday in November or December.

We will be using the auditorium for a lecture delivered to men only by Minister Louis Farrakhan of The Nation of Islam.

Because we would like to get started on the planning of our event, please respond as soon as possible.

Thank you in advance for your prompt attention. If you have any questions or need any further information, please let us know.

Sincerely,

/s/ Roland Muhammad/jx
Roland Muhammad Minister

RM:jx

Exhibit "B"

(Seal) City of Cleveland

MICHAEL R. WHITE, MAYOR

DEPARTMENT OF PARKS, RECREATION AND PROPERTIES

OLIVER B. SPELLMAN, JR.
DIRECTOR

500 LAKESIDE AVENUE
CLEVELAND, OHIO 44114-1099
(216) 664-2485
FAX: (216) 664-4086

October 19, 1994

Minister Roland Muhammad
Nation of Islam
14402-06 Kinsman Road
Cleveland, OH 44120

RE: Use of Cleveland Convention Center for Men Only Meeting

Dear Minister Muhammad:

Pursuant to your request at our meeting of October 6, 1994, this letter shall serve as the City of Cleveland's response to the Nation of Islam's request to utilize the City of Cleveland's Convention Center for the purpose of sponsoring a "men only" meeting.

Based upon our interpretation of the State of Ohio Revised Code Chapter 4112 and Section 667.01 of the City of Cleveland's Codified Ordinances, it would be unlawful for the City to deny or assist in the denial of any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap,

age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of a place of public accommodation.

The City cannot participate or acquiesce in any activity, including discriminatory advertising, which may result in a violation of these laws. The designation of your program as a "men only" event suggests that such a violation may occur.

If, however, it is not your intent to deny entry to any person at this event on the basis of any of the reasons stated above, or to violate in any manner any of the provisions of the aforementioned laws, then the Cleveland Convention Center may be used for your event, provided that mutually satisfactory lease terms can be developed.

If you should have any questions regarding this matter, please call me at 664-2485, or Assistant Director of Law Letcher Eley at 664-2705.

Very truly yours,

/s/ Oliver B. Spellman, Jr.
Oliver B. Spellman, Jr.
Director

cc: Susan Claytor
Letcher Eley

An Equal Opportunity Employer

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CITY OF CLEVELAND, Plaintiff,	)	CASE NO. 1:95-CV-0250
v.	)	
NATION OF ISLAM,	)	JUDGE WHITE
Defendant/ Counterclaimant.	)	

ANSWER AND COUNTERCLAIM OF DEFENDANT NATION OF ISLAM

(Filed Feb. 3, 1995)

KEVIN FRANCIS O'NEILL (0010481)
Legal Director
American Civil Liberties Union of Ohio Foundation, Inc.
1223 West Sixth Street
Cleveland, Ohio 44113-1353
(216) 781-8639

RAYMOND VASVARI (0055538)
ACLU Cooperating Attorney
1300 Bank One Center
600 Superior Avenue East
Cleveland, Ohio 44114-2650
(216) 522-1925

SCOTT GREENWOOD
(0042558)
ACLU Cooperating
Attorney
Greenwood & Hudson
2301 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 684-0101

GINO SCARSELLI
(0062327)
ACLU Cooperating
Attorney
Berkman, Gordon, Murray
Palda & DeVan
2121 The Illuminating Bldg.
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CITY OF CLEVELAND, Plaintiff, v. NATION OF ISLAM, Defendant/ Counterclaimant.	)	CASE NO. 1:95-CV-0250 JUDGE WHITE

**ANSWER AND COUNTERCLAIM OF
DEFENDANT NATION OF ISLAM**

ANSWER

Now comes Defendant, the Nation of Islam ("the Nation"), by and through undersigned counsel, and, for its Answer to the Complaint for Declaratory Judgment filed herein by Plaintiff City of Cleveland ("the City"), states as follows:

FIRST DEFENSE

1. The Nation admits that this action, originally filed in state court, sought declaratory relief under Ohio Revised Code § 2721.01; admits that the City sought to invoke the Court's jurisdiction under Ohio Revised Code § 2721.02; and denies – for lack of knowledge, want of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment set forth in paragraph 1 of the City's Complaint.

2. The Nation admits the allegations in paragraph 2 of the City's Complaint.

3. The Nation admits the allegations in paragraph 3 of the City's Complaint.

4. The Nation admits the allegations in paragraph 4 of the City's Complaint.

5. The Nation admits the allegations in paragraph 5 of the City's Complaint.

6. The Nation admits the allegations in paragraph 6 of the City's Complaint.

7. The Nation admits that on or about October 19, 1994, Director of Parks and Recreation Oliver Spellman wrote to Minister Roland Muhammad to state the City's legal position with regard to Ohio Revised Code Chapter 4112 and § 667.01 of the Codified Ordinances of the City of Cleveland in connection with the use of the Cleveland Convention Center. The Nation specifically denies that either Ohio Revised Code Chapter 4112 or § 667.01 of the Codified Ordinances of the City of Cleveland prevents the City from permitting the Nation to hold a single-

gender religious and political meeting in the Cleveland Convention Center. The Nation further denies – for want of knowledge, lack of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment in paragraph 7 of the City's Complaint.

8. The Nation admits that paragraph 8 of the City's Complaint purports to describe the contents of a letter attached to that Complaint as Exhibit B; denies that it intends or that it has ever intended to violate the public accommodation laws of the State of Ohio or the City of Cleveland; and further denies – for want of knowledge, lack of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment in paragraph 8 of the City's Complaint.

9. The Nation admits the allegations in paragraph 9 of the City's Complaint.

10. The Nation admits that paragraph 10 of the City's Complaint purports to describe the contents of a letter attached to that Complaint as Exhibit C.

11. The Nation admits that paragraph 11 of the City's Complaint purports to describe the contents of a letter attached to that Complaint as Exhibit C.

12. The Nation admits the allegations in paragraph 12 of the City's Complaint.

13. The Nation admits the allegations in paragraph 13 of the City's Complaint.

14. The Nation admits that Chapter 4112 of the Ohio Revised Code prohibits gender discrimination and prescribes remedies therefor; but specifically denies that Chapter 4112 in any way prohibits the City from leasing its Convention Center for a single-gender religious and political meeting; and further denies – for want of knowledge, lack of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment in paragraph 14 of the City's Complaint.

15. The Nation admits that § 667.01 of the Codified Ordinances of the City of Cleveland prohibits discrimination on the basis of gender by the proprietor of a public accommodation and sets forth the penalties described in paragraph 15 of the City's Complaint; but specifically denies that such ordinance in any way prohibits the City from leasing its Convention Center for a single-gender religious and political meeting; and further denies – for want of knowledge, lack of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment in paragraph 15 of the City's Complaint.

16. The Nation admits that a suit by it against the City, with representation provided through the American Civil Liberties Union of Ohio, was and is the possible result of the City's refusal to grant it access to the Convention Center for a singe-gender religious and political meeting. The Nation specifically denies, however, that allowing such a meeting would subject the City to liability or punishment under Ohio Revised Code Chapter 4112 or § 667.01 of the Codified Ordinances of the City of Cleveland. The Nation further denies – for want of

knowledge, lack of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment in paragraph 16 of the City's Complaint.

17. The Nation denies – for want of knowledge, lack of information sufficient to form a belief, or otherwise – each and every remaining claim, allegation, assertion, and/or averment in the City's Complaint neither specifically admitted nor otherwise denied herein.

SECOND DEFENSE

The Nation states that the City's Complaint fails to state a claim upon which relief may be granted, in that neither Ohio Revised Code Chapter 4112 nor § 667.01 of the Codified Ordinances of the City of Cleveland prevents the proprietor of a place of public accommodation from leasing that accommodation to a single-gender group.

THIRD DEFENSE

The Nation states that the City's Complaint fails to state a claim upon which relief may be granted, in that the Free Speech Clause of the First Amendment to the United States Constitution prohibits the City from refusing to lease its Convention Center to the Nation based upon the intended content and/or audience of the religious and political meeting that the Nation seeks to hold there.

FOURTH DEFENSE

The Nation states that the City's Complaint fails to state a claim upon which relief may be granted, in that the Free Exercise Clause of the First Amendment to the United States Constitution prohibits the City from refusing to lease its Convention Center to the Nation based upon the intended content and/or audience of the religious and political meeting that the Nation seeks to hold there.

FIFTH DEFENSE

The Nation states that the City's Complaint fails to state a claim upon which relief may be granted, in that the Free Assembly Clause of the First Amendment to the United States Constitution prohibits the City from refusing to lease its Convention Center to the Nation based upon the intended content and/or audience of the religious and political meeting that the Nation seeks to hold there.

SIXTH DEFENSE

The Nation states that the City's Complaint is barred by the doctrine of waiver.

SEVENTH DEFENSE

The Nation states that the City's Complaint is barred by the doctrine of estoppel.

EIGHTH DEFENSE

The Nation states that the City's Complaint fails to state a claim upon which relief may be granted, in that it seeks an advisory opinion and thus fails to present a justiciable controversy that is ripe for judicial review.

NINTH DEFENSE

The Nation states that the City's Complaint is barred by the doctrine of unclean hands.

WHEREFORE, having fully answered, Defendant Nation of Islam prays that Plaintiff City of Cleveland's Complaint for Declaratory Judgment be dismissed with prejudice at Plaintiff's costs.

COUNTERCLAIM FOR PRELIMINARY AND PERMANENT INJUNCTION

I. INTRODUCTION

1. Defendant Nation of Islam ("the Nation") brings this counterclaim, a civil action for preliminary and permanent injunctive relief, against Plaintiff City of Cleveland ("the City") in order to obtain access to the City's Convention Center for a "men only" address by Minister Louis Farrakhan. The City has steadfastly refused to lease its Convention Center to the Nation for a single-gender event – even though, less than a year ago, the City twice permitted the Billy Graham Crusade to hold single-gender events at that very facility. Now the City has gone so far as to sue the Nation in state court, seeking a declaratory judgment that the First Amendment does not forbid

the City from denying the Nation access to the Convention Center. Having removed the action to federal court, the Nation brings this counterclaim to obtain an injunction requiring the City to lease the Convention Center to the Nation in accordance with the same fees and requirements that the City imposes on any other group seeking access to the Center.

2. In order:

(a) to prevent the City from using "concerns" about gender discrimination as a pretext for denying a forum to a controversial speaker;

(b) to prevent the City – when acting in its role as proprietor, leasing a municipally-owned facility for a private event – from treating the Billy Graham Crusade more favorably than the Nation of Islam;

(c) to vindicate Minister Farrakhan's First Amendment freedom, when speaking at a private event, to determine *who* will be on the receiving end of his religious and political message; and

(d) to prevent the City from imposing, as the price for access to its Convention Center, a requirement that the Nation compromise its religious traditions – specifically, the Nation's 60-year-old tradition of holding men-only and women-only meetings on Monday and Saturday nights, respectively;

the Nation prays that this Court grant it preliminary and permanent injunction relief.

II. JURISDICTION, VENUE, AND PARTIES

A. Jurisdiction

3. The Nation brings this counterclaim to protect rights conferred by the First and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 3, 7, and 11 of the Ohio Constitution.

4. This Court has jurisdiction over the instant counterclaim under 28 U.S.C. § 1331, in that it arises under the Constitution of the United States; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of State authority, of the rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that its purpose is to secure equitable relief under Acts of Congress – specifically, 42 U.S.C. § 1983 – providing for the protection of civil rights; and, finally, as to our claims under the Ohio Constitution, under the doctrine of pendent jurisdiction.

B. Venue

5. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the counterclaim defendant, City of Cleveland, is situated in this District and because the Nation's counterclaim arose here.

C. Parties

6. Defendant/Counterclaimant Nation of Islam is a religious organization, led by Minister Louis Farrakhan, with affiliated mosques in major cities throughout the United States. The Nation's local presence, Muhammad's

Mosque No. 18, is headed by Minister Roland Muhammad.

7. Counterclaim Defendant City of Cleveland is a charter municipality organized pursuant to the Home Rule provisions of Article XVIII, § 7 of the Ohio Constitution.

III. FACTS

8. The Nation's religious teachings include the notion that men and women play distinct roles in Islamic culture. For this reason, the Nation has a 60-year-old tradition in which, once a week, its ministers deliver *separate* addresses to their male and female constituents. For 60 years, Saturday night has been reserved for "women only" meetings. Likewise, for 60 years, Monday night has been reserved for "men only" meetings. Three additional meetings are conducted mid-week in which male and female constituents are equally welcome.

9. The Nation's leader, Minister Louis Farrakhan, frequently travels throughout the United States, delivering speeches to Nation members and others who are interested in hearing his religious and political message. These speeches are private events, staged in facilities – municipally-owned or otherwise – that are leased by representatives of the local mosque. Attendance is normally free of charge – but, consistent with the Nation's 60-year tradition, his Monday and Saturday night speeches are restricted to male and female audiences, respectively.

10. Minister Roland Muhammad, who heads the local mosque in Cleveland, decided to organize a Monday night event in which Minister Farrakhan would deliver a "men only" address. On September 20, 1994, he wrote to the Cleveland Convention Center's Marketing Department, inquiring whether the Public Hall Auditorium would be available for such an event on "any Monday in November or December." (A copy of that letter is attached to this Counterclaim as "Exhibit A.")

11. A representative of the Marketing Department, Mr. Tony Scott, replied by telephone. He insisted upon a face-to-face meeting between Minister Muhammad and Oliver B. Spellman, Jr., the Convention Center's Director.

12. That meeting was held on October 6 at the Convention Center. Attending on behalf of the City were Mr. Spellman; Letcher Eley, an attorney in the City's Law Department; Susie A. Claytor, the Convention Center's Assistant Director; and Sam Thomas, the City's Director of Community Relations.

13. At that meeting, Mr. Spellman stated that "under no circumstances" would the City permit the Convention Center to be used for an all-male event. He subsequently reiterated this position in an October 19 letter to Minister Muhammad. In that letter (which is attached to this Counterclaim as "Exhibit B"), Mr. Spellman asserted that it would be unlawful for the City to permit the single-gender use of "a place of public accommodation."

14. The Nation subsequently discovered, however, that, earlier in 1994, the City twice permitted the Billy

Graham Crusade to hold single-gender events at the Convention Center. This information was obtained from the Convention Center's own Marketing Department. On February 25, the Billy Graham Women's Crusade held what was promoted as an all-female event. On March 12, the Billy Graham Men's Crusade held what was promoted as an all-male event.

15. When the Nation's lawyers confronted City officials with the Billy Graham facts and requested comparable access to the Convention Center, the City responded by asking repeatedly for more time – and then, without warning, filed this lawsuit against the Nation.

IV. CLAIMS FOR RELIEF

COUNT I

(Federal Speech and Assembly Claims Under the First Amendment)

16. The Nation incorporates the allegations in paragraphs 1 through 15 of this Counterclaim as if fully rewritten herein.

17. By refusing to lease its Convention Center to the Nation of Islam for a "men only" address by Minister Louis Farrakhan, the City has violated the Nation's free speech and assembly rights under the First and Fourteenth Amendments to the U.S. Constitution.

COUNT II

(Pendent Speech and Assembly Claims Under the Ohio Constitution)

18. The Nation incorporates the allegations in paragraphs 1 through 17 of this Counterclaim as if fully rewritten herein.

19. By refusing to lease its Convention Center to the Nation of Islam for a "men only" address by Minister Louis Farrakhan, the City has violated the Nation's free speech and assembly rights under Article I, §§ 3 and 11 of the Ohio Constitution.

COUNT III

(Federal Free Exercise Claim Under the First Amendment)

20. The Nation incorporates the allegations in paragraphs 1 through 19 of this Counterclaim as if fully rewritten herein.

21. By refusing to lease its Convention Center to the Nation of Islam for a "men only" address by Minister Louis Farrakhan, the City has violated the Nation's right to free exercise of religion under the First and Fourteenth Amendments to the U.S. Constitution.

COUNT IV

(Pendent Free Exercise Claim Under the Ohio Constitution)

22. The Nation incorporates the allegations in paragraphs 1 through 21 of this Counterclaim as if fully rewritten herein.

23. By refusing to lease its Convention Center to the Nation of Islam for a "men only" address by Minister Louis Farrakhan, the City has violated the Nation's religious freedom and freedom of conscience under Article I, § 7 of the Ohio Constitution.

V. PRAYER FOR RELIEF

WHEREFORE, Defendant/Counterclaimant Nation of Islam demands that judgment be entered against the City of Cleveland. Specifically, the Nation of Islam demands such injunctive and other relief as follows:

(a) Preliminary and permanent injunctions ordering the City – and all officers, employees, and agents under its supervision or control – to lease the Cleveland Convention Center to the Nation of Islam for a "men only" address by Minister Louis Farrakhan, to be scheduled for a mutually convenient date and time, under the same terms and conditions that the City imposes on any other group seeking access to the Convention Center.

(b) An award of attorney fees, pursuant to 42 U.S.C. § 1988, and costs.

(c) An order granting Defendant/Counterclaimant Nation of Islam such other and further relief as this Court deems proper.

Respectfully submitted,

/s/ Kevin Francis O'Neill
KEVIN FRANCIS O'NEILL (0010481)
Legal Director
American Civil Liberties Union
of Ohio Foundation, Inc.
1223 West Sixth Street
Cleveland, Ohio 44113-1353
(216) 781-8639

SCOTT GREENWOOD (0042558)
ACLU Cooperating Attorney
Greenwood & Hudson
2301 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 684-0101

RAYMOND VASVARI (0055538)
ACLU Cooperating Attorney
1300 Bank One Center
600 Superior Avenue East
Cleveland, Ohio 44114-2650
(216) 522-1925

GINO SCARSELLI (0062327)
ACLU Cooperating Attorney
Berkman, Gordon, Murray, Palda &
DeVan
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorneys for Defendant/Counter-claimant,
The Nation of Islam, on Behalf of the
American Civil Liberties Union of Ohio
Foundation, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Answer and Counterclaim of Defendant Nation of Islam was served by regular U.S. mail upon Steven J. Terry, Chief Counsel, Department of Law, and Heather Graham-Oliver, Chief Assistant Director of Law, City Hall, Room 106, 601 Lakeside Avenue, Cleveland, Ohio 44114, counsel for Plaintiff City of Cleveland, this 3rd day of February, 1995.

/s/ Kevin Francis O'Neill
KEVIN FRANCIS O'NEILL

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CITY OF CLEVELAND City Hall, Room 106 601 Lakeside Avenue Cleveland, Ohio 44114 Plaintiff, vs. NATION OF ISLAM 14402-06 Kinsman Road Cleveland, Ohio 44120 Defendant. *also serve:* NATION OF ISLAM c/o Minister Roland Muhammad 14402-06 Kinsman Road Cleveland, Ohio 44120	CASE NO. 282998 JUDGE COMPLAINT FOR DECLARATORY JUDGMENT

For its complaint for Declaratory Judgment, the City of Cleveland states the following:

Parties and Jurisdiction

1. This is an action for declaratory judgment, pursuant to Section 2721.01 *et seq.* of the Ohio Revised Code, and jurisdiction is conferred upon this Court by Section 2721.02.

2. The City of Cleveland ("City") is a municipal corporation organized and existing under the Constitution of the State of Ohio.

3. Defendant Nation of Islam is a religious organization which seeks through its local Mosque located at 14402-06 Kinsman Road, Cleveland, Ohio 44120 to lease space at the City's Convention Center.

Facts Giving Rise To A Justiciable Controversy

4. On September 20, 1994, Minister Roland Muhammad, on behalf of the Nation of Islam, inquired about the availability of the Cleveland Convention Center, Public Hall Auditorium for a lecture to be delivered by Minister Louis Farrakhan to a "men only" audience. A copy of this letter is attached to this Complaint as Exhibit "A".

5. On October 6, 1994, the City's Director of Parks Recreation and Properties, Oliver B. Spellman, Jr., and other City officials met with representatives of the Nation of Islam, including Minister Roland Muhammad, concerning the Nation's proposal to lease the City's Convention Center facility.

6. Among the topics discussed at the October 6, 1994 meeting was the fact that the Nation of Islam's letter of September 20, 1994, specified that the event was to be conducted for "men only".

7. On October 19, 1994, Director Oliver Spellman wrote to Minister Roland Muhammad to apprise him that Ohio Revised Code Chapter 4112 and Section 667.01 of the Codified Ordinances of the City of Cleveland prohibit discrimination in public accommodations on the basis of sex and other specified grounds.

8. Director Spellman's letter of October 19, 1994, a copy of which is attached to this Complaint as Exhibit

"B", informed Minister Muhammad that the City would lease its Convention Center to the Nation of Islam, provided that it is not the Nation of Islam's intent to violate the public accommodation laws of the State of Ohio or City of Cleveland.

9. On December 16, 1994, Kevin Francis O'Neill, Legal Director of the American Civil Liberties Union of Ohio Foundation ("ACLU"), responded to Director Spellman's letter of October 19, 1994, a copy of which is attached to this Complaint as Exhibit "C".

10. In his letter, Mr. O'Neill alleges that the Nation of Islam's First Amendment rights would be violated unless the City leases the Convention Center facility to them.

11. Mr. O'Neill's letter concludes by declaring that unless the City agrees to lease the Convention Center to the Nation of Islam for a "men only" event, "we will be forced to consider litigation."

12. In subsequent telephone conversations, Mr. O'Neill reiterated that if the City does not allow the Nation of Islam to conduct a "men only" event at the Cleveland Convention Center, litigation would result.

13. On January 4, 1995, Mr. O'Neill informed the City that it must agree, prior to the close of business on January 6, 1995, to allow the Nation of Islam to conduct a "men only" event at the Cleveland Convention Center, or lawsuit will be filed against the City.

14. If the City agrees to lease the Convention Center to the Nation of Islam for a "men only" event as demanded by the ACLU, then the City may be subjected

to a complaint before the Ohio Civil Rights Commission on the basis of gender discrimination under Chapter 4112 of the Ohio Revised Code, or the initiation of a lawsuit under the same Chapter. Such a complaint may be filed by any person alleging to be aggrieved.

15. In addition, Section 667.01 of Cleveland's Codified Ordinances prohibits discrimination by any person, including the proprietor of a public facility, on the basis of gender and other grounds, and subjects the violator to a criminal fine and/or imprisonment.

16. Accordingly, the City of Cleveland faces either a lawsuit filed by the Nation of Islam for an alleged violation of its First Amendment rights, or legal proceedings by any person alleging to be aggrieved on the basis of gender discrimination contrary to Chapter 4112 of the Ohio Revised Code or Section 667.01 of the Cleveland Codified Ordinances.

WHEREFORE, plaintiff City of Cleveland prays for a declaratory judgment as follows:

1. A declaration that conducting an event for "men only" at the City of Cleveland's Convention Center would constitute a violation of Ohio Revise Code Chapter 4112 and Section 667.01 of the Codified Ordinances of Cleveland, Ohio, and that the denial of the facility to the Nation of Islam under circumstances where it intends to deny entry to women does not violate the First Amendment rights or the Nation of Islam.

2. Upon the whole complaint, that the Court grant such other legal and equitable relief to which plaintiff City of Cleveland may be entitled, and the costs and expenses of prosecuting this action to a just conclusion.

Respectfully submitted,

SHARON SOBOL JORDAN (0006731)
Director of Law

/s/ Heather Graham-Oliver
HEATHER GRAHAM-OLIVER
(0024647)
Chief Assistant Director of Law

Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

ATTORNEYS FOR DEFENDANT
CITY OF CLEVELAND

The Nation of Islam

In the Name of Allah [LOGO] 14402-06 Kinsman Road
Cleveland, Ohio 44120
(216) 751-7736

IN THE NAME OF ALLAH, THE BENEFICENT, THE MERCIFUL I BEAR WITNESS THAT THERE IS NO GOD BUT ALLAH AND I BEAR WITNESS THAT MUHAMMAD IS HIS MESSENGER.

AS-SALAAM ALAIKUM

September 20, 1994

Mr. Tony Scott
Marketing
Cleveland Convention Center
500 Lakeside Avenue
Cleveland, Ohio 44114

Dear Mr. Scott:

We would like to inquire availability of the Cleveland Convention Center, Public Hall Auditorium for any Monday in November or December.

We will be using the auditorium for a lecture delivered to men only by Minister Louis Farrakhan of The Nation of Islam.

Because we would like to get started on the planning of our event, please respond as soon as possible.

Thank you in advance for your prompt attention. If you have any questions or need any further information, please let us know.

Sincerely,

/s/ Roland Muhammad/jx
Roland Muhammad Minister

RM:jx

Exhibit "B"

(Seal) City of Cleveland

MICHAEL R. WHITE, MAYOR

DEPARTMENT OF PARKS, RECREATION AND PROPERTIES

OLIVER B. SPELLMAN, JR.
DIRECTOR

500 LAKESIDE AVENUE
CLEVELAND, OHIO 44114-1099
(216) 664-2485
FAX: (216) 664-4086

October 19, 1994

Minister Roland Muhammad
Nation of Islam
14402-06 Kinsman Road
Cleveland, OH 44120

RE: Use of Cleveland Convention Center for Men Only Meeting

Dear Minister Muhammad:

Pursuant to your request at our meeting of October 6, 1994, this letter shall serve as the City of Cleveland's response to the Nation of Islam's request to utilize the City of Cleveland's Convention Center for the purpose of sponsoring a "men only" meeting.

Based upon our interpretation of the State of Ohio Revised Code Chapter 4112 and Section 667.01 of the City of Cleveland's Codified Ordinances, it would be unlawful for the City to deny or assist in the denial of any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap,

age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of a place of public accommodation.

The City cannot participate or acquiesce in any activity, including discriminatory advertising, which may result in a violation of these laws. The designation of your program as a "men only" event suggests that such a violation may occur.

If, however, it is not your intent to deny entry to any person at this event on the basis of any of the reasons stated above, or to violate in any manner any of the provisions of the aforementioned laws, then the Cleveland Convention Center may be used for your event, provided that mutually satisfactory lease terms can be developed.

If you should have any questions regarding this matter, please call me at 664-2485, or Assistant Director of Law Letcher Eley at 664-2705.

Very truly yours,

/s/ Oliver B. Spellman, Jr.
Oliver B. Spellman, Jr.
Director

cc: Susan Claytor
Letcher Eley

An Equal Opportunity Employer

Exhibit "C"

ACLU
American Civil Liberties of Ohio Foundation

HAND-DELIVERED

December 16, 1994

Oliver B. Spellman, Jr.
Director
Department of Parks, Recreation,
and Properties
City of Cleveland
600 Lakeside Avenue
Cleveland, Ohio 44114-1099

RE: City of Cleveland's Refusal to Permit Use of Cleveland Convention Center by Minister Louis Farrakhan for "Men Only" Address

Dear Mr. Spellman:

In my capacity as Legal Director for the American Civil Liberties Union of Ohio, I write this letter on behalf of the Nation of Islam, which sought our assistance in vindicating its First Amendment freedoms.

On October 19, 1994, you sent a letter to Minister Roland Muhammad rejecting the Nation's request to lease the Cleveland Convention Center for a "men only" address by its leader, Minister Louis Farrakhan. In rejecting the Nation's application, you asserted that it would be unlawful for the City to permit any single-gender use of the Convention Center.

Earlier this year, however, the City twice permitted the Billy Graham Crusade to hold single-gender events at the Convention Center. We obtained this information

from the Convention Center's own Marketing Department, which disclosed that the Billy Graham Women's Crusade held an all-women's event on February 25 and the Billy Graham Men's Crusade held an all-men's event on March 12. On both of these occasions, the City leased the Convention Center to the Northeast Ohio Billy Graham Crusade – which is exactly the same arrangement that the Nation of Islam sought for its event.

The City's concerns about gender discrimination were conspicuously absent when it was approached by the Billy Graham Crusade. That it voiced these concerns only when approached by the Nation of Islam shows that the City denied Minister Farrakhan a forum solely because of his religious and political beliefs.

1233 West Sixth Street • Cleveland, Ohio 44113-1353 • 216/781-6276 • 216/781-6277 • fax: 781-6438

The First Amendment does not permit the City to treat the Billy Graham Crusade more favorably than the Nation of Islam in making a municipally-owned facility available for speech activities by private groups. The City is not free to establish one set of rules for speech by Christian organizations and another set of rules for Islamic organizations.

Moreover, aside form being pretextual, the gender discrimination excuse fails for yet another reason: The City cannot use a group's religious or political beliefs as the basis for denying it access to a publicly-owned forum. The price for access to such a forum cannot be the

requirement that a religious group check its tenets at the door.

Ultimately, then, the City is bereft of a constitutional basis for rejecting Minister Farrakhan's application. We hereby demand that the City agree to lease the Convention Center to the Nation of Islam for a "men only" address by its leader. Please respond by Monday, December 19, no later than 5:00 p.m., or we will be forced to consider litigation.

Very truly yours,

/s/ Kevin Francis O'Neill
Kevin Francis O'Neill
Legal Director

cc: Sharon Sobol Jordan, Law Director (hand-delivered)
Letcher Eley, Assistant Law Director (hand-delivered)

KFO-0063

667.01 Discrimination in Public Accommodations

No person, being the proprietor of his employee, keeper or manager of an inn, restaurant, eating house, barber shop, public conveyance by land of water, theater, public or private hospital or other place of public accommodation and amusement, shall deny to a citizen, except for reasons applicable to all citizens, and regardless of race, religion, color, sex, sexual orientation, national origin, age, disability, ethnic group or Vietnam-era or disabled veteran status, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, and no person shall aid or incite the denial thereof. Whoever violates this section shall be subject to the revocation of a license issued for the operation of such business. (Ord. No. 77-94. Passed 3-14-94, eff. 3-23-94)

4112.01 Definitions

(A) As used in this chapter:

(9) "Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

4112.02 Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

Supreme Court, U. S.
F I L E D
DEC 12 1997
CLERK

No. 97-814

In The SUPREME COURT OF THE UNITED STATES

October Term, 1997

CITY OF CLEVELAND,

Petitioner,

v.

NATION OF ISLAM, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS A. JACOBS
Counsel of Record
4905 Stonehaven Drive
Upper Arlington, Ohio 43220-2827
(614) 459-5690

JOAN M. ENGLUND
Legal Director
American Civil Liberties Union of Ohio Foundation, Inc.
1266 West Sixth Street, Suite 200
Cleveland, Ohio 44113
(216) 781-8639

KEVIN FRANCIS O'NEILL
ACLU Cooperating Attorney
Assistant Professor of Law
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-5282

Counsel for Respondents

REPHRASED QUESTION PRESENTED

Whether by seeking a declaratory judgment in a state court during negotiations over the threat of a federal civil rights lawsuit a municipality may avoid an award of attorneys' fees to a nominal defendant who prevailed after removal on a counterclaim and to plaintiffs who received injunctive relief in a consolidated federal case?

TABLE OF CONTENTS

Page

REPHRASED QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. NO CONFLICT EXISTS IN THE FEDERAL COURTS OVER THE QUESTIONS PRESENTED IN THE PETITION. 3

II. THE ANSWERS IN THE SIXTH CIRCUIT TO THE QUESTIONS PRESENTED IN THE PETITION ARE PERFECTLY CONSISTENT WITH THIS COURT'S UNDERSTANDING OF 42 U.S.C. § 1988. 6

III. ON THE FACTS OF THIS CASE, THE FIRST QUESTION PRESENTED IN THE PETITION IS NOT DISPOSITIVE OF TWO RESPONDENTS' STATUTORY RIGHT TO A FEE AWARD. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Blanchard v. Bergeron, 489 U.S. 87 (1989) 7

Blum v. Stenson, 465 U.S. 886 (1994) 9

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 3, 4, 6-8, 10

City of Cleveland v. Nation of Islam, No. 96-3291 (6th Cir. 1997) 1, 2

Fair Housing Council v. Landow, 999 F.2d 92 (4th Cir. 1993) 6

Farrar v. Hobby, 506 U.S. 103 (1992) 6

Hensley v. Eckerhart, 461 U.S. 424 (1983) 10

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 5

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 3, 4

Kirchberg v. Feenstra, 708 F.2d 991 (5th Cir. 1983) 3, 8

Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) . . . 6

Love v. Mayor, City of Cheyenne,
620 F.2d 235 (10th Cir. 1980) 4, 8

Martin v. Heckler, 773 F.2d 1145
(11th Cir. 1985)(*en banc*) 4

Morscott, Inc. v. City of Cleveland,
936 F.2d 271 (6th Cir. 1991) 4

Newman v. Piggie Park Enterprises,
390 U.S. 400 (1968) 7, 8

Pierce v. Underwood, 487 U.S. 552 (1988) 9

Pino v. Locascio, 101 F.3d 235 (2d Cir. 1996) 6

Shelley v. Kraemer, 334 U.S. 1 (1948) 8

Teitelbaum v. Sorenson,
648 F.2d 1248 (9th Cir. 1981) 4

*White v. New Hampshire Department of
Employment Security*, 455 U.S. 445 (1982) 6

Williams v. Hanover Housing Authority,
113 F.3d 1294 (1st Cir. 1997) 4, 5

Constitutional, Statutory and Rule Provisions

First Amendment, United States Constitution 1, 5

Equal Access to Justice Act, 28 U.S.C.
§ 2412(d)(1)(a) 9

42 U.S.C. § 1988 . . . . . *passim*

Fed. R. Civ. P. 11 2

Secondary Authority

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5912 n. 4 8

STATEMENT OF THE CASE

Under Rule 15.2 of the Rules of the Supreme Court of the United States, Respondents are obliged "to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Unfortunately, two significant misstatements were made in the Petition, one involving the sequence of events and the other the identity of parties.

The sequence of events leading to Petitioner's declaratory judgment action justified the appellate court's concern with "parties rushing to the courthouse, eager to achieve plaintiff status" by "quickly filing declaratory judgment actions when faced with possible constitutional challenges." *City of Cleveland v. Nation of Islam*, No. 96-3291 (6th Cir. 1997)(Appendix to Petition at App. 5). Contrary to Petitioner's version that it commenced litigation "after fruitless negotiations," Petition at 5, a race to the courthouse was run without Respondents' knowledge when; ***during*** negotiations over a documented and researched threat to vindicate in federal court the First Amendment right of access to a public forum, Petitioner requested more time to respond and instead sought home field advantage by commencing a lawsuit in state court.

The party to Petitioner's declaratory judgment action was the Nation of Islam. After that action was removed to federal court, a separate federal action was brought by two other parties: Muhammad's Mosque No. 18 and Minister Roland Muhammad. *See City of Cleveland*, *supra*, at App.

2-3. Petitioner combines these parties as if they were the same party. Petition at 6 ("The Nation filed an answer and counterclaim on February 3, 1995. (App. 34-50). Thereafter, on February 7, 1995, the Nation commenced a separate action for preliminary and permanent injunctive relief[.]"). The two actions were consolidated, with declaratory relief being granted to the nominal defendant on the counterclaim in the removed case and injunctive relief awarded to the prevailing plaintiffs in the original action.

REASONS FOR DENYING THE PETITION

On the two questions presented by Petitioner, the federal appellate courts are in harmony: (1) the label or technical status of a prevailing party yields to the function that party has served in vindicating civil rights and exposing a violator of those rights; and (2) the good faith of the losing party is not a special circumstance justifying denial of a fee award to such a prevailing party. Adhering to the express language of 42 U.S.C. § 1988, with its plain meaning corroborated by legislative history and statutory purpose, the courts have refused to stage a race to the courthouse where the winner of the race, a nominal plaintiff, is rewarded with immunity from a fee award. Recognizing that good faith is the expected motivation of every competent government official and the presumed litigating posture of every losing party, particularly when the absence of good faith may be sanctioned under Fed. R. Civ. P. 11, the courts have not converted this ordinary circumstance into a special one exempting the losing party from 42 U.S.C. § 1988.

Petitioner has failed to demonstrate why this Court should grant review when presented with neither a conflict nor a deviation from statutory language and congressional intent and purpose. Indeed, review of the first question presented does not even dispose of the statutory right to a fee award exercised by the actual plaintiffs, Muhammad's Mosque No. 18 and Minister Roland Muhammad. Moreover, reversal of settled law is especially ill advised because a practical, functioning regime for handling fee awards would be replaced with an impractical, dysfunctional invitation to litigate those awards.

I. NO CONFLICT EXISTS IN THE FEDERAL COURTS OVER THE QUESTIONS PRESENTED IN THE PETITION.

A fee award under 42 U.S.C. § 1988 is made to a party for vindicating federal civil rights and exposing a civil rights violator. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978)("the plaintiff is the chosen instrument of Congress to vindicate [civil rights]" and fees are awarded "against a violator of federal law"). Any party performing these functions is entitled to a fee award.

No federal appellate court has denied fees to a nominal defendant based on the label or technical status of that party. In *Kirchberg v. Feenstra*, 708 F.2d 991, 996 (5th Cir. 1983), the appellate court emphasized the function served by the nominal defendant: "[I]t was she who brought the constitutional claim decided by the district court." Focus on how the party functioned, rather than the category in which the party was listed, has also been the standard in this Court. In *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989), intervenors were

protected by the *Christiansburg Garment Co.* standard because "in contrast to losing Title VII defendants who are presumptively liable for attorney's fees, losing intervenors . . . have not been found to have violated anyone's civil rights."

Absent a conflict among the federal appellate courts or a discrepancy with this Court's approach to fee awards, review is inappropriate. Indeed, review would only be proper were the lower courts to decide fee awards based on labels or technical status, the indefensible position taken by Petitioner's first question presented.

That good faith does not constitute a "special circumstance" under 42 U.S.C. § 1988 is "the rule in this and apparently every other circuit that has considered the issue." *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1301 (1st Cir. 1997). *See also Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 273 (6th Cir. 1991)("However, good faith is not a 'special circumstance' which justifies the denial of attorney's fees under § 1988."); *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985)(*en banc*)("Defendant's good faith, lack of culpability, or prompt remedial action do not warrant a denial of fees under the special circumstances preclusion."); *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981)("Good faith by itself is not a special circumstance justifying a denial of attorney's fees."); *Love v. Mayor, City of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980)("[T]he good faith of the defendant is not a reason for the denial of § 1988 attorney's fees.").

In *Williams v. Hanover Housing Authority*, *supra*, 113 F.3d at 1301-02, the appellate court appreciated that reliance on mistake of law is a good faith defense: "The

circuits are in agreement, however, that defendants' good faith reliance even on settled law (which was scarcely the case here) is not a 'special circumstance' warranting a denial of attorneys' fees under § 1988[.]" This understanding is so widespread in the lower federal courts that Petitioner's approach would inject confusion and encourage impractical litigation over good faith.

Petitioner's argument on special circumstances is analytically indistinguishable from a good faith exception to a fee award. Claiming that it had to choose between honoring equal access to public accommodations and permitting a speaker rental of a public forum for an address to a single-sex audience in the tradition of the speaker's religion, Petitioner is effectively invoking good faith for its declaratory judgment gambit.

By not appealing the adverse merits decision in the District Court, Petitioner has acknowledged that it made a mistake, denying the speaker's First Amendment rights due to a misapplication of public accommodations principles. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), this Court unanimously held that a comparable "use of the state's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."

Petitioner is in no different position than any other losing party who has in good faith taken steps or made decisions later determined to be unlawful. Consequently, the Petition actually presents the question of whether fee-shifting provisions should be emasculated, a question that this Court has absolutely no reason to entertain.

Finally, the dire prediction by Petitioner that the "special circumstances" exception will evaporate unless this Court grants a writ of certiorari is belied by established precedent. Lower federal courts have adopted the view that nominal relief may be a special circumstance. *See, e.g., Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996), applying *Farrar v. Hobby*, 506 U.S. 103, 117 (1992)(O'Connor, J., concurring)("§ 1988 contemplates the denial of fees to *de minimis* victors."). Outrageous or inexcusable conduct by the prevailing party has likewise been recognized as a special circumstance. *See, e.g., Fair Housing Council v. Landow*, 999 F.2d 92, 97-98 (4th Cir. 1993); *Lewis v. Kendrick*, 944 F.2d 949, 956 (1st Cir. 1991). Untimely application for fees is another settled special circumstance. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 454 (1982)("We believe that this discretion will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party."). The special circumstance of a prevailing defendant has also been considered. *Christiansburg Garment Co., supra*. Review by this Court is hardly necessary to preserve the "special circumstances" exception to fee awards.

II. THE ANSWERS IN THE SIXTH CIRCUIT TO THE QUESTIONS PRESENTED IN THE PETITION ARE PERFECTLY CONSISTENT WITH THIS COURT'S UNDERSTANDING OF 42 U.S.C. § 1988.

As interpreted by this Court, the language of 42 U.S.C. § 1988, its legislative history, and its purpose support a fee award to a nominal defendant and prevailing plaintiffs who have vindicated federal civil rights by overcoming a good faith denial of First Amendment access

to a public forum. Consequently, the decision below fully comports with precedent and resolves the questions presented in the Petition in a way that should be left undisturbed by review.

Fee-shifting in a federal civil rights action is governed by 42 U.S.C. § 1988, which provides in pertinent part that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The juxtaposition of "discretion" and "may" led this Court to recognize a narrow "special circumstances" exception:

> The section states that the court "in its discretion" may allow a fee, but that discretion is not without limits: the prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Blanchard v. Bergeron, 489 U.S. 87, 89 n. 1 (1989), quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

In *Christiansburg Garment Co.*, this Court noted that the language of 42 U.S.C. § 1988 was neutral as to party status. Citing statutes that limited fee-shifting to prevailing plaintiffs, the Court described the language as "more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants." 434 U.S. at 415-16. Losing plaintiffs were accorded added protection in *Christiansburg Garment Co.* due to the special circumstance that prevailing defendants had neither vindicated civil rights nor exposed "a violator of federal law." 434 U.S. at 418.

In the statute's phrasing Congress has not precluded fee awards to nominal defendants or imposed a good faith exception. As to nominal defendants, the legislative history and statutory purpose confirm the import of the language. "In enacting § 1988, Congress specifically provided that the *Newman* rule would apply to prevailing plaintiffs who were nominal defendants." *Kirchberg*, *supra*, 708 F.2d at 996.

The legislative history is explicit. Citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), a Senate Committee explained that "in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5912 n. 4. As indicated above, Congress focused on the civil rights enforcement function performed by the party, rather than the party's label or technical status.

As to good faith, 42 U.S.C. § 1988 establishes only that a party must have prevailed. *See*, *e.g.*, *Love v. Mayor, City of Cheyenne*, *supra*, 620 F.2d at 236 ("§ 1988 contains no suggestion that there is a need to establish bad faith as a basis for the award of attorney's fees."). Under *Christiansburg Garment Co.*, the two prerequisites are vindication of federal civil rights by demonstration that the opponent has violated those rights of the prevailing party. In *Newman*, *supra*, 390 U.S. at 401, this Court traced the legislative history of 42 U.S.C. § 1988 and rejected any requirement of a "subjective standard" of bad faith. "[N]o new statutory provision would have been necessary" if Congress merely intended to duplicate preexisting judicial power to shift fees when a party did not act in good faith. *Id.* at 402 n. 4. Nothing in the legislative history or statutory purpose supports engrafting a good faith exemption, which would then be litigated on every

application for a fee award, and this Court ought not grant review for such a quixotic venture.

Citing the Equal Access to Justice Act (EAJA), Petitioner urges this Court to adopt a comparable approach for 42 U.S.C. § 1988. The EAJA expressly prohibits a fee award when the government's position was "substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(a). Obviously, this language differs markedly from both the phrasing of 42 U.S.C. § 1988 and the precedent on special circumstances. *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988)("justified to a degree that could satisfy a reasonable person"). Thus, Petitioner is really seeking a legislative amendment, a flatly unpersuasive basis for a party to invoke this Court's jurisdiction.

In light of the language, legislative history, and statutory purpose, the mode of interpretation in another 42 U.S.C. § 1988 case dictates rejection of this Petition. In *Blum v. Stenson*, 465 U.S. 886, 896 (1994), this Court described that mode: "Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." Responding to the type of policy argument raised by Petitioner, this Court reaffirmed the limited scope of judicial review: "Resolution of these two arguments begins and ends with an interpretation of the attorney's fee statute." *Id.* at 893. Similarly, resolution of Petitioner's effort to secure a writ of certiorari should begin and end with the language of 42 U.S.C. § 1988 permitting an award to nominal defendants and omitting a good faith immunity to an award.

III. ON THE FACTS OF THIS CASE, THE FIRST QUESTION PRESENTED IN THE PETITION IS NOT DISPOSITIVE OF TWO RESPONDENTS' STATUTORY RIGHT TO A FEE AWARD.

Distinguishing the parties' identities is important to the first question presented in the Petition. The issue raised there was that nominal defendants should be treated like actual defendants. The parties' distinct identities demonstrate that the first question presented is not dispositive in this case.

Both Muhammad's Mosque No. 18 and Minister Roland Muhammad were actual plaintiffs seeking preliminary and permanent injunctive relief, and they secured that relief in the consolidated case. The Nation of Islam was a nominal defendant and secured relief on a counterclaim to the declaratory judgment action brought by Petitioner.

Regardless of how *Christiansburg Garment Co.* applies to nominal defendants, two prevailing plaintiffs are entitled to a fee award here. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)("if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit"). Reviewing a question that does not control the underlying issue of a fee award is a futile exercise of this Court's jurisdiction.

CONCLUSION

In *Hensley*, *supra*, 461 U.S. at 437, this Court admonished lower federal courts and parties that "[a]

request for attorney's fees should not result in a second major litigation." That message should not be diluted by granting a writ of certiorari in this case.

Determining when a prevailing party deserves a fee award and which special circumstances warrant denial of any award has not divided the lower federal courts or been problematic in federal civil rights actions. The controlling standards track the language of 42 U.S.C. § 1988 and fulfill the function envisioned by Congress for fee awards. For these and the foregoing reasons, the Petition should be denied.

Dated: December 12, 1997

Respectfully submitted,

LOUIS A. JACOBS
Counsel of Record
4905 Stonehaven Drive
Upper Arlington, Ohio 43220-2827
(614) 459-5690

KEVIN FRANCIS O'NEILL
ACLU Cooperating Attorney
Assistant Professor of Law
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-5282

JOAN M. ENGLUND
Legal Director
American Civil Liberties Union of
Ohio Foundation, Inc.
1266 West Sixth Street, Suite 200
Cleveland, Ohio 44113
(216) 781-8639

Counsel for Respondents